

1 THE HON. ROBERT J. BRYAN

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5 **UNITED STATES DISTRICT COURT**
6 **WESTERN DISTRICT OF WASHINGTON, TACOMA**

7 **QUINSTREET, INC., a California**
8 **corporation;**

9 **Plaintiff,**

10 **v.**

11 **MARK FERGUSON d/b/a WHEW.COM, an**
12 **individual,**

13 **Defendant,**

NO. C08-05525-RJB

DEFENDANT MARK FERGUSON'S
TRIAL BRIEF

14 **Introduction**

15
16 This case is a vindictive, spiteful, ill founded exercise in abusing the judicial process. The
17 Plaintiff has brought this case in an act of pure retaliation. As is evident by the Plaintiff's
18 portion of the Agreed Pre-Trial Order, the Plaintiff does not possess the evidence
19 necessary to prove the elements of their claims, yet they persist in litigating this case
solely to impose costs on Defendant. Plaintiff should be sanctioned.

20 **Factual Background**

21
22 Ferguson originally brought suit in this Court against Quinstreet and various other parties
23 for sending Ferguson unsolicited commercial email (hereafter referred to by its common
24 name, "spam") under the Federal CAN SPAM Act (15 USC 7701 et seq.) and Washington
State's Commercial Electronic Mail Act "CEMA" (RCW 19.190 et seq.) in Cause No.

25 **DEFENDANT MARK FERGUSON'S TRIAL BRIEF -1**
QUINSTREET, INC. v. FERGUSON

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1 C07-5378, captioned FERGUSON v. ACTIVE RESPONSE GROUP et al. (hereafter the
2 “prior case’). The prior case was dismissed entirely on the basis of Ferguson’s standing.
3 At no time did this or any other Court address the substance of Ferguson's claims that the
4 spam at issue violated the substantive provisions of the CAN SPAM Act.

5 At the conclusion of the prior case, Quinstreet moved for attorney fees. This Court
6 denied that motion, noting that the question of Ferguson's standing was a “close call,”
7 that the CAN SPAM law was not well developed, and that Ferguson had a good faith
8 basis for bringing Ferguson's claims. Quinstreet then brought a motion for
9 reconsideration. Quinstreet also lost this motion, and the Court repeated it's statements
10 that Ferguson had brought his claims in good faith.

11 Quinstreet, apparently infuriated by the Court's ruling denying them their attorney fees,
12 then filed this frivolous lawsuit. Quinstreet based this lawsuit on Ferguson's comments
13 about the prior case that were published on the internet. Quinstreet's entire suit thus
14 amounts to the allegations that:

15 1)Ferguson had “defamed” them, and

16 2)Ferguson had Intentional Interfered with Prospective Economic Advantage

17 Quinstreet's evidence for these allegations consists entirely of the following statements
18 that were posted on the Internet:

19 “Quinstreet located in California is still spamming.”

20 “Quinstreet is still spamming me for DeVry University,...”

21 “Quinstreet still spamming for DeVry University.”

22 “I have many more spam from these clowns and have many more archived
23 redirects back to Quinstreet but I needed a place to start for future reference.”
24

1 “[T]his was Quinstreet spam.”

2
3 “All Quinstreet spam.... Sad bastards. I will be collecting and archiving all their
4 spam for my appeal.”

5 “The truly sad thing is Kraft, Xerox, Quinstreet, Kaplan University [Washington
6 Post], The Journal, and so many other fortune 500 and fortune 100 companies
7 hire these spammers with knowledge of their actions.”

8 “We are now battling QuinStreet who is still spamming me after we started
9 suing them. Their spam violates the CAN SPAM Act of 2003 but the judge
10 figures they don’t want to hear these types of cases and have made massive
11 excuses for Quinstreet.”

12 “These are asinine ruling and interpretations of the CAN SPAM Act and so we
13 have decided to appeal the case. I have 1,500 spam right now that I can
14 attribute to Quinstreet.”

15 “The fact is, Quinstreet, Inc. is still spamming me and others even after they
16 were sued. Their spam violates CAN SPAM; already proven in a court and it
17 violates in my opinion Washington, California’s and every other Consumer
18 Protection Law I have read.”

19 “The client company. . . QUINSTREET, INC., use[s] a shield, the affiliates,
20 hired by a secondary company. . . to send the actual spam.”

21 “This is a very effective shield that QUINSTREET. . . and others have used to
22 avoid any responsibility what-so-ever- for years of spamming to this point.”

1 “Quinstreet still spamming for DeVry University and now their attorney Stephan
2 Barber compounds this with threats against me because he was caught lying to
3 the court.”

4 “In fact Barber, opposing counsel actually lied on a couple of occasions to the
5 Court in his declarations to the court...”

6 “The spammer’s attorney Steve Barber of RMK in California continues to lie to
7 the court and the court does nothing.”

8 “Steve Barber has to lie to defend his client and since the court is not holding
9 his feet to the fire they are using his lies to they don’t have to hear the case.”

10 “He has lied to the judge about my deposition about what I said. This was
11 easily shown to be false, yet the judge did nothing.”

12
13 “So in the end I have a dishonest attorney Steve Barber that lies to defend his
14 client Quinstreet, I have a judge that things these cases are something he
15 doesn’t want to hear and I have business slowly being ruined by so much spam
16 that I am unable to mitigate the damages any further.”

17 “I mean, if Mr. Barber was going to fabricate my testimony what exactly did he
18 want to depose me for?”

19 “[Steve Barber] forgets to read his own Declarations for factual content and so
20 does not find the multiple lies in Docket 66, below is one of those lies.”

21 “I suspect I don’t need to post the rest and this is only a single incident where
22 Steve Barber lied to the court and directly wrote the exact opposite of what I
23 said in my deposition.”

Proof At Trial

It is difficult to imagine how Quinstreet can possibly hope to prevail on their claims. The statements by Ferguson are either not actionable, or they are easily shown to be true. For example, it is difficult to imagine how Quinstreet can hope to establish that Ferguson's statement that "Quinstreet located in California is still spamming" was false. Quinstreet admits it is located in California. By their own admission, Quinstreet's entire business model consists of sending *unsolicited commercial email*, a/k/a "spam". Indeed, sending spam appears to be the only way Quinstreet makes any money. They have admitted that they send spam on behalf of various clients in their various filings with this very Court. Accordingly, Quinstreet, by their own admission, is a "spammer.", notwithstanding the distasteful, perjorative use of that term to Quinstreet. Further, Ferguson will submit evidence at trial that Quinstreet is widely known on the Internet as a spammer. Ferguson will submit hundreds of complaints posted on line where others have complained about Quinstreet's spam. Quinstreet will be unable to show that Ferguson's statements did anything other than state the obvious, and repeat Quinstreet's well earned reputation as a spammer, and Ferguson's opinion that their spam violates the law.

Nevertheless, despite the fact that Quinstreet is a spammer, and the fact that Quinstreet has a well earned reputation as a spammer, independent of any statements made by Ferguson, Quinstreet has continued to prosecute its unsupportable claims, the very definition of a frivolous action. Quinstreet pursues this action for no other reason than to vexatiously impose the costs of litigation on Ferguson.

It is also difficult to imagine how Quinstreet hopes to prevail on statements Ferguson made about Mr. Barber. Mr. Barber is not a party to this action. Even if Mr. Ferguson's statements about Mr. Barber were false, and therefore actionable, Quinstreet does not have standing to bring those claims. Any action based on statements made about Mr. Barber are personal to him, and may only be pursued by him. For Quinstreet to claim that statements about Mr. Barber should somehow be imputed to Quinstreet strains all credulity. In any event, the evidence will show that the statements about Mr. Barber are

1 all true. In fact, he did lie to this Court. As long as Ferguson establishes that Mr. Barber
2 lied once to this Court, then any nonspecific statements about Mr. Barber lying become
3 true, establishing an absolute defense to such claims.

4 Ferguson will present evidence that Quinstreet is a “spammer” that sends, or causes to
5 be sent, millions of spam emails, hundreds of which were received by Ferguson. This
6 evidence will consist of the spam emails themselves, and publicly available records,
7 obtained through independent research by Ferguson that show that the spam in question
8 utilizes websites, domain names and IP addresses that are owned or controlled by
9 affiliates acting as Quinstreet agents.

10 Ferguson will further present evidence that, at a minimum, these spam emails
11 deliberately obfuscated the identity of the sender, do not contain physical addresses,
12 used domains that were fraudulently registered, used domains that were created and
13 registered using scripting, do not contain working unsubscribe mechanisms, or did not
14 contain working unsubscribe mechanisms for the statutory period, and for each of these
15 reasons therefore violate the substantive prohibitions of CAN SPAM Act. This evidence
16 will again consist of the spam emails themselves, together with publicly available records
17 that show that the domain names and IP addresses utilized by the spam in question and
18 that are owned or controlled by affiliates acting as Quinstreet agents intentionally
19 obfuscate the identity of the sender of the spam, and/or were fraudulently registered.

20 Ferguson will also present evidence consisting of transcripts of Mr. Ferguson's deposition
21 testimony, sworn statements, and the filings from the prior lawsuit. This evidence will
22 show that Quinstreet's prior lawyer, Stephen Barber, lied to this Court in filings he
23 submitted in the prior lawsuit by materially misrepresenting statements made by
24 Ferguson.

25 **Quinstreet's Burden To Prove Defamation**

Quinstreet is apparently under the mistaken impression that it is Ferguson's burden to
prove that Quinstreet's spam violates the CAN SPAM Act. However, it is a fundamental

1 requirement of any claim for defamation that the Plaintiff must show that any allegedly
2 defaming statements were actually false. Unless the Plaintiff can show that the
3 purportedly libelous statements were false, then the Plaintiff cannot establish the required
4 elements for defamation. To prevail on their claims, Quinstreet must therefore prove that
5 Ferguson's statement that Quinstreet's spam violates the CAN SPAM Act was not true.
6 The burden of proof rests with Quinstreet. Accordingly, Quinstreet must prove by a
7 preponderance of the evidence that the spam they send out complies with each of the
8 substantive provisions of the CAN SPAM Act set forth at 15 USC 7701 et seq.

9
10 To meet their burden of proof, Quinstreet must, at a minimum, prove ALL of the following
11 to establish compliance with the CAN SPAM Act, 15 USC § 7704:

12 1)Quinstreet must prove that their spam did not contain, or was not accompanied by,
13 header information that is materially false or materially misleading. 15 USC § 7704(a)((1).

14 2)Quinstreet must prove that their spam did not include an originating electronic mail
15 address, domain name, or Internet Protocol address the access to which for purposes of
16 initiating the message was obtained by means of false or fraudulent pretenses or
17 representations.15 USC § 7704(a)((1)(A).

18 3)Quinstreet must prove that the "from" line (the line identifying or purporting to identify a
19 person initiating the message) in their spam accurately identifies the person who initiated
20 the message.15 USC § 7704(a)((1)(B).

21 4)Quinstreet must prove that the header information in their spam accurately identified
22 the protected computer used to initiate the message because the person initiating the
23 message did not knowingly use another protected computer to relay or retransmit the
24 message for purposes of disguising its origin. 15 USC § 7704(a)(1)(C).

25 5)Quinstreet must prove that the person that initiated Quinstreet's spam did not have
actual knowledge, or knowledge fairly implied on the basis of objective circumstances,
that a subject heading of the message would be likely to mislead a recipient, acting
reasonably under the circumstances, about a material fact regarding the contents or
subject matter of the message. 15 USC § 7704(a)(2)

6)Quinstreet must prove that all of Quinstreet's spam contained a functioning return
electronic mail address or other Internet-based mechanism, clearly and conspicuously

1 displayed, that a recipient may use to send a reply electronic mail message or other form
2 of Internet-based communication requesting not to receive future commercial electronic
3 mail messages from that sender at the electronic mail address where the message was
received.(15 USC 7704(a)(3))

4 7)Quinstreet must prove that the Internet-based mechanism in their spam remained
5 capable of receiving such messages or communications for no less than 30 days after the
transmission of the original message. (15 USC 7704(a)(3))

6 8)Quinstreet must prove that all of Quinstreet's spam included a clear and conspicuous
7 identification that the message is an advertisement or solicitation.(15 USC 7704(a)(5)(i))

8 9)Quinstreet must prove that all of Quinstreet's spam included clear and conspicuous
9 notice of the opportunity to decline to receive further commercial electronic mail
messages from the sender.15 USC § 7704(a)(4).

10 10)Quinstreet must prove that all of Quinstreet's spam included a valid physical postal
address of the sender.(15 USC 7704(a)(5)(A)(iii))

11 11)Quinstreet must further prove that the electronic mail address of the recipient(s) of
12 their spam, including Ferguson, were not obtained using an automated means. 15 USC §
13 7704(a)(6)(B)(1)(a)(i)

14 12)Finally, Quinstreet must prove that their emails are not sent from domains which used
15 scripts or other automated means to register for multiple domains, electronic mail
16 accounts or online user accounts from which to transmit to a protected computer, or
17 enable another person to transmit to a protected computer, a commercial electronic mail
message that is otherwise unlawful in violation of 15 USC 7704(b)(2).

18 Quinstreet bears the burden of proving Ferguson's statements are false. A violation of
19 any one of the referenced substantive provisions of the statutes would defeat such a
20 claim. Quinstreet will not be able to meet this burden. Quinstreet has set forth no
evidence in the Agreed Pre-Trial Order that could possibly establish their compliance with
21 the CAN SPAM Act. In the Agreed Pre-Trial Order, Quinstreet identifies no witnesses or
22 exhibits that will be used to establish that the spam they send complies with the CAN
SPAM Act. If Quinstreet fails to show that their spam complies with the CAN SPAM Act,
23 then they cannot show that Ferguson's statements to the contrary are "false."
24

1 In the Agreed Pre-Trial Order, Quinstreet has only identified witnesses that will testify
2 about damage to Quinstreet's reputation. Quinstreet has not identified a single witness
3 who will testify about the specifics of any of their spam. Quinstreet is apparently under
4 the mistaken impression that it is Ferguson's burden to prove that Quinstreet's spam
5 violates the CAN SPAM Act. Quinstreet has apparently further convinced itself that
6 Ferguson will not be able to do so. Quinstreet is mistaken on both counts.

7 In the first instance, when Quinstreet fails in their case in chief to submit any direct
8 evidence whatsoever establishing that their spam is in compliance with the CAN SPAM
9 Act, Ferguson will move for a directed verdict, and the case will be over. If Quinstreet
10 cannot establish that their spam complies with the CAN SPAM Act, then they cannot
11 meet their burden of proving Ferguson's statements were "false."

12 If, for whatever reason, the case is allowed to continue to Mr. Ferguson's defense, Mr.
13 Ferguson's testimony and exhibits will then conclusively establish that Quinstreet's spam
14 does violate the CAN SPAM Act, and that therefore his statements are true. At that point
15 the case will be over. Truth is an absolute defense to any claim of defamation.

16 However, even if the fact finder somehow concludes Ferguson's testimony and evidence
17 fail to show that Quinstreet's spam violates the CAN SPAM Act, they will nevertheless
18 show that Ferguson's statements do not meet the requirements for defamation.

19 Even if the Court or the Jury does not agree with the conclusions Mr. Ferguson drew
20 related to violations of the CAN SPAM Act in Quinstreet's spam, Quinstreet must still
21 prove remaining essential elements of a claim for defamation by libel. Quinstreet must
22 therefore prove:

- 23 1) That Ferguson, by writing or printing, made a false and defamatory statement about the
24 plaintiff;
- 25 2) That Ferguson published the defamatory statement; and
- 3) That Ferguson:
 - a. knew the statement was false when he made it, and defamed plaintiff; or

1 b. published the statement in reckless disregard of whether the matter was false and
2 defamed plaintiff; or

3 c. acted negligently in failing to learn whether the matter published was false and
4 defamed plaintiff;

5 Quite simply, Quinstreet will never be able to prove any of these latter elements.
6 Quinstreet will never show that Ferguson had “actual knowledge” that his statements
7 were false. Quinstreet will never show that Ferguson “recklessly disregarded whether his
8 statements were false.” Finally, Quinstreet will never show that Ferguson acted
9 “negligently” for “failing to learn whether the matter published was false.” Quinstreet will
10 never be able to clear these hurdles because the evidence will show the exact opposite.

11 The evidence will show that long before Ferguson made any statements about
12 Quinstreet's spam, Ferguson carefully examined both Quinstreet's spam and the relevant
13 portions of the CAN SPAM Act. The evidence will show that it was only after spending
14 hours investigating Quinstreet's spam and the relevant public records that Ferguson drew
15 the conclusion that Quinstreet's spam violated the CAN SPAM Act.

16 While it may be at least conceivable that the Court or the Jury may come to a different
17 conclusion than Ferguson did with respect to Quinstreet's violation of the CAN SPAM Act,
18 as a result of Ferguson's thorough investigation and analysis, there is no credible
19 argument whatsoever that Ferguson “recklessly disregarded” whether his statements
20 were false, “acted negligently” in failing to learn whether the matter published was false,
21 or “acted with actual knowledge” that his statements were false.”

22 The evidence will show that Ferguson went to great lengths to investigate Quinstreet's
23 spam. Mr. Ferguson will testify as to very specific reasons that his analysis reached the
24 conclusion that Quinstreet's spam violated the CAN SPAM Act. Thus, Mr. Ferguson's
25 testimony will show that it was only after investigating Quinstreet's spam, learning the
26 facts related to it, performing a careful analysis, and concluding that the spam contained

1 violations of the Act did Mr. Ferguson publish statements indicating Quinstreet was a
2 spammer and that their spam violated the CAN SPAM Act.

3 Mr. Ferguson's statements unquestionably represented his opinion about what he
4 believed to be true at the time, and were only made after a very thorough and careful
5 analysis. Accordingly, even if the finder of fact disagrees with the conclusions Mr.
6 Ferguson drew in his analysis, Mr. Ferguson's conduct can not be characterized as
7 "willful", "reckless", or "negligent.", as the statements were based upon Mr. Ferguson's
8 informed opinion.

9 **Opinion or Fact - Question of Law.** Whether an allegedly defamatory
10 statement is one of opinion or fact is a question of law. GARDNER v. MARTINO
11 563 F.3d 981 (Fed. 9th Cir. 2009), citing: Slover v. Or. Bd. of Clinical Soc. Workers, 144
12 Or.App. 565, 927 P.2d 1098, 1100 (1996).

13 Mr. Ferguson believed the statements were true at the time that he made the statements,
14 and he continues to believe that they are true statements to this day. He drew his
15 conclusions as a result of his very careful research and analysis. Once Mr. Ferguson has
16 testified about the level of detail and care that went into his analysis, Quinstreet will never
17 be able to show the essential element of "willful", "reckless", or "negligent" conduct
18 necessary to sustain a claim for defamation by libel. This is true regardless of whether
19 anyone agrees with Mr. Ferguson's analysis or the conclusions that he ultimately drew.

20 **Quinstreet's Burden Re: Interference With Prospective Economic Advantage**

21 The elements of interference with prospective economic advantage resemble those of
22 intentional interference with contract. They are: "(1) an economic relationship between
23 the plaintiff and some third party, with the probability of future economic benefit to the
24 plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part
25 of the defendant designed to disrupt the relationship; (4) actual disruption of the
relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the

1 defendant."

2 Quinstreet cannot prove elements 3, 4 or 5. In the Agreed Pre-Trial Order, Quinstreet
3 has only identified witnesses that will testify about damage to Quinstreet's reputation
4 about how Quinstreet's "damaged" reputation has caused them to "lose specialized and
5 talented candidates". Accordingly, Quinstreet does not even propose to offer evidence of
6 the existence or actual disruption of any actual economic relationship between Quinstreet
7 and any Third Party. If Quinstreet's claim is simply that they "lost specialized and
8 talented candidates" in the field of sending spam as a result of Ferguson's statements,
9 and the finder of fact somehow can be persuaded that Quinstreet had an "actual"
10 economic relationship, as opposed to a prospective economic relationship, with these
11 unidentified candidates, Quinstreet's claims will still fail. Quinstreet will never be able to
12 show that Ferguson had knowledge of any supposed relationship between Quinstreet
13 and these unidentified candidates, about whom Ferguson had no knowledge.

14 **Conclusion**

15 It is clear that Plaintiff does not even come close to possessing the evidence necessary
16 to prove the elements of their claims. Plaintiff's claims are insupportable, and their case
17 is frivolous in the extreme. At the conclusion of the trial, Mr. Ferguson will move for an
18 order awarding Mr. Ferguson attorney fees under FRCP 11 and RCW 4.24.350

19 **RESPECTFULLY SUBMITTED this 9th day of October, 2009.**

20 i.JUSTICE LAW, P.C.

20 DOUGLAS E. MCKINLEY, JR

21 Attorney at Law

22 /S/ Robert J. Siegel

23 Robert J. Siegel, WSBA #17312

24 Attorney for Plaintiffs

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24 Attorney for Plaintiffs

25 **DEFENDANT MARK FERGUSON'S TRIAL BRIEF -12**
QUINSTREET, INC. v. FERGUSON

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2009, I electronically filed the attached document with the Clerk of the Court using the CM/ECF, which will provide notice to all counsel of record herein.

/s/ Robert J. Siegel
Robert J. Siegel, WSBA#17312